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Constitutional Law -- Labor-Management Relations Act -- Non-Communist Affidavit Required of Union Officers

the Court in its analysis of the instant case. They are rightly circumvented, however, by the Court's holding that the adequacy of constructive service rests solely on its reasonable probability of giving actual notice. The trustee, in the instant case, knew the whereabouts of the known beneficiaries. They were given notice by mail when the trust was established. The inconvenience, incidental to mailing notice, should not relieve the trustee of his obligation to give notice where reasonable. Expediency in the administration of complex trusts is desirable, but the safeguard of our constitutional guaranty of due process of law should not be disregarded to achieve this end.

CONSTITUTIONAL LAW—LABOR-MANAGEMENT RELATIONS ACT—NON-COMMUNIST AFFIDAVIT REQUIRED OF UNION OFFICERS

Noncompliance by the unions with the requirements of § 9(h) of the Labor Management Relations Act of 1947[1] raised the issue of constitutionality of the provision. The section establishes, as a condition precedent to the use of the facilities of the National Labor Relations Board, the filing of an oath by each official of the labor union that he is not a member of, or affiliated with, the Communist party and that he does not believe in the overthrow of the government by force or support any organization that so believes or teaches. Failure of union officers to supply such affidavits in one case resulted in dismissal of an action by the union to enjoin an election in which its name did not appear on the ballot.[2] Refusal to comply with the requirement in another situation prevented enforcement of a Board order requiring the company involved to bargain on pension matters.[3] The two cases were considered simultaneously by the Court. *Held*, that § 9(h) of the Labor Management Relations Act does not unreasonably abridge individual freedoms and thus is compatible with the Federal Constitution. *American Communications Ass'n v. Douds*, 70 Sup. Ct. 674, *rehearing denied*, 70 Sup. Ct. 1017 (1950).

The Act was designed to remove obstructions to the free flow of commerce.[4] The power of Congress to protect interstate commerce has been established.[5] However, the method chosen by the enactment of § 9(h) to prevent dangerous political strikes necessarily met with objection from those who found their liberties somewhat lessened thereby. The labor group was encouraged to chose officers who would sign the affidavits or it might not

1. 49 Stat. 449 (1935), 29 U.S.C. § 151 (1946), as amended 61 Stat. 146 (1947), 29 U.S.C. § 159(h) (Supp. 1949) (Taft-Hartley Act).
2. Wholesale and Warehouse Workers Union Local No. 65 v. Douds, 79 F. Supp. 563 (S.D. N.Y. 1948).
3. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948).
4. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
5. *Ibid.*

take advantage of the facilities offered under the other sections of the Act. The individual officer candidate had to be careful to affiliate himself properly and be willing to take the oath or he probably would not be considered for such a position. So, rights of the members to elect, of the officer to believe and to join other groups, and of the union to act were touched by this Congressional remedy. And the Court was faced with a problem as to whether these infringements on individual freedom were within the bounds of constitutionality.

One of the major grounds for attack has been the contention that the requirement is a violation of the First Amendment.[6] However, the manner in which this abridgment of the right of free speech operates has been conceived differently by those who have considered it. In a case which was affirmed by the Supreme Court without passing on the validity of the provision of § 9(h) the dissenting opinion of the lower federal court labelled the portion of the oath directed at members of the Communist party as an infringement of free speech.[7] Justice Jackson in his partial dissent from the opinion in the instant case found that another portion of the oath—the part requiring a statement of belief—was the offending section,[8] while Justice Black's dissenting opinion pointed out that the entire affidavit was a dangerous breaking down of individual liberties as set up in the Bill of Rights.[9]

Although the freedoms protected by the First Amendment are not considered absolute, the clear and present danger test has been applied in free speech cases to prevent curbing of individual rights when not justified by imminent harm to the public.[10] The test has been applied by the courts to determine whether the liberty of the individual or the good of the public is to be deemed paramount in specific cases of conflict.[11] It has been stated that in the application of the test the usual presumption of constitutionality of legislation is reversed in favor of the careful guarding of the individual liberties which form such an important part of the American philosophy.[12] On the other hand, it has been insisted just as strongly that, even though a statute touches on rights guaranteed by the First Amendment, it must be construed to be constitutional if at all possible.[13] Nevertheless, the amount of consideration which has been afforded this point

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6. U.S. CONST. AMEND. I.

7. *See* National Maritime Union of Am. v. Herzog, 78 F. Supp. 146, 177 (D. D.C. 1948).

8. *See* American Communications Ass'n v. Douds, 70 Sup. Ct. 674, 702, *rehearing denied*, 70 Sup. Ct. 1017 (1950).

9. *Id.* at 707.

10. Schenck v. United States, 249 U.S. 47 (1919).

11. Comments, 48 MICH. L. REV. 337 (1950), 4 MIAMI L. Q. 67 (1949).

12. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943); *see* National Maritime Union of Am. v. Herzog, *supra* note 5, at 183 (dissenting opioion).

13. National Maritime Union of Am. v. Herzog, *supra* note 5, at 155; *see* West Virginia State Board of Education v. Barnette, *supra* note 10, at 646 (dissenting opinion).

in the decisions emphasizes the high regard with which the courts look upon these civil liberties.

The wide variance of opinion as to the specific freedom of speech violated and the true resultant evil to be avoided demonstrates the difficulty of applying the clear and present danger test to the situation. The requirement that an oath be taken setting forth the affiliations and beliefs of the individual is perhaps a violation of a freedom of silence rather than of speech. It has been suggested that such a liberty is protected by the Fifth Amendment rather than by the First.[14]

It is the contention of the National Labor Relations Board that Congress has afforded a facility for the unions, the privilege of becoming an exclusive bargaining agent, and that § 9(h) is merely a condition to qualify the recipient of the favor.[15] It is true there have been many situations in which Congress has been upheld in its power to condition the utilization of facilities afforded upon compliance with certain conditions, as in the use of the mails.[16] However, the Fifth Amendment guards against the imposition of arbitrary and discriminatory conditions.[17] The question then becomes a matter of whether the requirement established by Congress that the affidavits be furnished is reasonably calculated to accomplish the protection of interstate commerce from political strikes without imposing an extremely unfair burden on particular individuals or groups.

Congress decided the means selected would best accomplish this end when it amended the National Labor Relations Act. In deciding that § 9(h) does not violate the Constitution, the Court affirmed the findings of Congress and refused to substitute its judgment as to the necessity of such restrictions. There is danger that, unless the decision of the Court be restricted very narrowly to the specific situation involved, it could prove a precedent for permitting Congress to infringe upon First Amendment rights indirectly and gradually diminish individual liberties.

CONTRACTS — ASSIGNMENT OF WARRANTY — QUANTITY

A vendor of whiskey in storage gave to the original vendee a warranty, against excess loss in quantity,[1] which was assigned to the sub-purchaser in a general sale of assets. *Held*, the sub-purchaser, as assignee, can enforce the warranty of quantity against the original vendor, though there is no

14. See Nutting, *Freedom of Silence*, 47 MICH. L. REV. 181, 219 (1948).
15. American Communications Ass'n v. Douds, *supra* note 8, at 679.
16. Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921); Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913); Champion v. Ames, 188 U.S. 321 (1903).
17. *cf.* Walling v. Sun Publishing Co., 47 F. Supp. 180, 191 (W.D. Tenn. 1942).

1. The warranty was against excess outage. Outage is loss of content from seepage, evaporation or whatever the cause. Excess outage is all outage beyond that allowed by the Government for tax computation purposes. Hunter-Wilson Distilling Co. v. Foust Distilling Co., 181 F.2d 543, 544 (3d Cir. 1950).